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IN THE

# Supreme Court of the United States

No. 477

RICHARD HUSTY, AND CHARLES LAUREL,

*Petitioners,*

vs.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SITXH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

JOHN B. McMAHON,
PERCY F. PARROTT,
HAROLD A. KESLER,
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TO THE HONORABLE SUPREME COURT OF THE UNITED STATESS

The petitioners respectfully show the Court that in the March term, A. D. 1930, of the District Court of the United States, Western District of Michigan, Southern Division, they were indicted for violation of the National Prohibition Act, as amended, on two counts: first, for transportation; and second, for possession; the latter count averring the conviction of Richard Husty in November, 1922, and in April, 1928, for unlawful possession.

Both petitioners were convicted on both counts and Richard Husty was sentenced for a term of five years, and fined Three Thousand Dollars, ($3,000.00), and Charles Laurel was sentenced for one year and six

months; both sentences having been imposed apparently under the Jones Act, so-called.

These convictions and judgments were reviewed by the United States Circuit Court of Appeals of the Sixth Circuit, Case No. 5660, and the judgments and sentences of the trial court were affirmed without opinion, by the said court, and in its order, found as follows:

> "(1) that the search was reasonable and the motion to suppress properly denied; (2) *that the indictment was good and that it was not necessary to make reference therein to the so-called Jones Law;* (3) that it was proper upon the trial to exclude evidence as to the reasons for the search, that subject matter having been foreclosed by the decision of the motion to suppress; (4) *that the sentence was supported by conviction on the second count;* (5) and that the other errors alleged are not well taken." (Italics ours.)

Throughout the proceedings in the District Court the petitioners saved exceptions to adverse rulings on: (1) petition to suppress evidence, i. e. the liquor seized; (2) *demurrer;* (3) *motion to quash;* (14) motion for separate trial; (5) *motion to direct verdict at conclusion of the governments case;* (6) motion to direct at conclusion of all the evidence; (7) *motion for new trial;* (8) admission and rejection of evidence and requests to, and objections to, the charge, *and on the sentence.*

Proper exceptions were also saved to the rulings of the Circuit Court of Appeals.

Your petitioners show, that the record in this case discloses, that Husty was fined for possession in 1922 and 1928; and, although he was under more or less constant surveillance at all times since 1922, the government officers were unable to discover any sales or at-

tempts to commercialize violations of the law, unless these two isolated arrests for possession are so considered.

There is no claim that Laurel was ever in custody before for any violation of any character.

Both petitioners were sentenced as if in the class of habitual sellers, and as persons who attempt to commercialize violations of the law, over proper objection on the part of Husty, yet there appears no evidence of sales or commercialization in the record.

It is also shown that if the two previous arrests of Husty are considered, as they evidently were by the lower courts, they happened before the Jones Law became effective.

Your petitioners show this to be a case of great public importance because the prosecution was under the Jones Law and involves:

1. The rights, duties, and responsibilities of government officers in making arrests without warrants—and consequent searches and seizures—of automobiles, where it is uncertain, under this law, whether the offense is a felony or misdemeanor until the case has been tried. The rights to arrest without warrant are manifestly different in the two cases.

2. Whether the indictment must show a charge for misdemeanor or felony under this act or violate Amendment VI.

3. Whether at the trial the Government must establish beyond a reasonable doubt, habitual sales or attempts to commercialize, and whether this is properly a jury question within Amendment VI.

4. Whether, any counts in same indictment of previous convictions, for possession, can be considered

properly in the determination of the sentence as a misdemeanor or felony.

5. Whether convictions for possession prior to the effective date of the Jones Law should be considered.

6. Whether the question of slight or casual violations is entirely within the discretion of the court, without limitation, and what constitutes an abuse of same, and if this is cruel and unusual punishment.

That there is more or less conflict of authority in the decisions of the District Courts and the Circuit Courts of Appeal, and many of these important matters are now left undecided in reported cases.

Your petitioners further show that other questions of importance are involved herein namely:

1. Whether the indictment must aver that the violation was done knowingly, and the government prove this averment beyond a reasonable doubt as a material part of the case, and whether the indictment described offense with sufficient particularity to allow one to plead former jeopardy.

2. Whether the arrest without warrant preceeded the search, or followed the search, and as a matter of law whether either were lawful, having been made after sufficient evidence of probable cause.

3. Whether, where the opportunity existed to obtain and serve a proper warrant for arrest, or a search warrant, the officer, having the information, should have done so, and did this constitute unreasonableness and lack of prudence?

4. Whether cross-examination of the officers, as to reliability of information on which an arrest is made without warrant should have been allowed.

Your petitioners show that the lower courts either

ignored or ruled wrongfully upon each and all of the above questions and propositions of law.

Your petitioners are advised that the Circuit Court of Appeals erred in affirming the convictions and sentences of the District Court aforesaid, and contend that the District Court should have been reversed. Your petitioners present herewith as part of this petition a transcript of the record of the Circuit Court of Appeals.

Petitioners submit with this petition a brief discussing in detail the matters above suggested, to which the attention of this Honorable Court is directed.

Your petitioners, therefore, respectfully pray that a writ of certiorari may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Sixth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the said case, entitled Richard Husty and Charles Laurel vs. United States of America, No. 5660, to the end that the said case may be reviewed and determined by this Court as provided by Section 240, Judicial Code, or that your petitioners may have such other or further relief or remedy in the premises as this Court may deem appropriate and in conformity with said provision of the Judicial Code and that the said judgment of the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

JOHN B. MCMAHON,
PERCY F. PARROTT,
HAROLD A. KESLER,
*Solicitors for Petitioners.*

## BRIEF IN BEHALF OF PETITION FOR WRIT OF CERTIORARI

This petition seeks to review a judgment of the Circuit Court of Appeals, Sixth Circuit, entered, June 28th, 1930, (R-68), affirming a judgment of the Southern Division of Michigan, Western District, for violation of the National Prohibition Act, entered March 13th, 1930.

(References to the Record in the Circuit Court of Appeals will be in parenthesis containing the letter R followed by the page number).

The facts as disclosed by the evidence (R. 23 to 58) may be concisely stated as follows:

Upon the day of the purported arrest herein, it seems that a government officer received information over the telephone that Husty had liquor in an automobile at a certain location in Grand Rapids.

The officer testified that he met the person furnishing the information during the day (R-27). He further testifies that immediately after the arrest he made the search approximately at 8 P. M., and used the flash light in so doing, (R-31).

There is no positive evidence that the person furnishing the information had seen the liquor in the car, although Scully asked him if he had seen it in the car (R-28). Scully was the officer.

The officer claimed, of course, that the source of this information was reliable and that he believed he was acting prudently in relying upon it; and yet, although he knew the location of the liquor, and the description of the automobile in which it was located, and the name of the suspect, he did not deem the information sufficiently reliable to cause him to either secure a warrant for the arrest of Husty or a search warrant for

the search and seizure of the automobile described. Instead, he proceeded with other officers, to the location described, parked his car directly across the street from an automobile answering the description contained in the information received. He waited there for some period of time before Husty and Laurel, and another person who escaped, proceeded to get into the described automobile, and attempted to drive off with the same, until stopped and arrested by the government agents, within a foot or so after starting.

While awaiting directly opposite this suspected car for some period of time, it appears from the record that no attempt was made to secure a search warrant or a warrant for the arrest of Husty, who was suspected, and no attempt was made to inspect the contents of the automobile, although it stood there all this time, unoccupied, unlocked, and unguarded, and an inspection thereof would have revealed the presence of the liquor.

The arrest was made without warrant, and the search and seizure without search warrant.

There was nothing suspicious about the automobile or Husty before the car was stopped by the officers, and no evidence of the presence of liquor in the same.

There is no direct evidence in the record as to where Husty and Laurel came from, upon entering the automobile, to whom the automobile belonged, to whom the liquor belonged, or that they had any knowledge of the presence of the liquor in this automobile.

There is nothing in the record to indicate that Husty or Laurel, at any time, were ever involved in any sales of liquor, let alone habitual sales.

Nor is there any evidence of any commercializing attempts to violate the law.

There are no facts in the record that indicate, as-

suming this was Husty's liquor, otherwise than it was for personal consumption.

The indictment was drawn in the terms of the statute and in no way identified the occasion, place, kind, character, or quantity of liquors and gave no sufficient information to petitioners so that they could plead former acquittal or conviction against another indictment or trial. It also contained no reference to the provisions of the Jones Act regarding habitual sales and commercialization.

Cross-examination as to the source of the information received by the agents was refused, and counsel was not permitted to go into its dependability or question the credibility of the officers claim of reasonableness and prudence.

The arrest was held legal apparently, solely because the information received in this case turned out to be correct, the question of reasonable ground therefore being disregarded. That at the time, as far as the officers, knew, except from the hearsay information, Husty and Laurel were committing no offense and were not fugitives from justice.

The affirmance of the judgments and sentences by the Circuit Court of Appeals, amounting, as it does, to a virtual white-wash of all errors claimed in the proceedings in the District Court, it seems proper to specifically direct your attention, therefore, to the specification of claims advanced, all of which were denied, in the trial court, as folows:

First: *Motion to Suppress Evidence*, because of illegal and unlawful arrest, and consequent search and seizure; because as a matter of law, there was not sufficient evidence of probable cause, ample opportunity existed to obtain and serve a proper warrant for arrest

and a proper search warrant, or the arrest followed the search.

SECOND: *The Demurrer to the Indictment and the Motion to Quash,* on the grounds that the offenses were not set out with sufficient particularity, so that former convictions or jeopardy could not be set up against another indictment, and also because, the accused were not appraised or informed of the nature and cause of the accusation, as to whether it was a misdemeanor or a felony, under the Jones Act, and also because there was no averment of knowledge on the part of the accused.

THIRD: *At the Trial,* because there was no evidence of knowledge, and because the issues under the Jones Act as to habitual sales, or attempts to commercialize were not submitted to the jury, and because of the refusal to permit cross-examination of the officer as to the source of the communication received by him as effecting its credibility as a basis for probable cause and the reasonableness of the arrest.

FOURTH: *The Sentences,* being for a felony under the Jones Act was not intended to apply to an isolated case of transportation, (Count 1), mere convictions for possession are not within its terms, (Count 2), and convictions prior to the effective date of the Jones Law, especially for possession, cannot be considered in applying the penalty under this law; and also because the punishment is cruel and unusual, and the fine is excessive.

The constitutional provisions involved in this case are: Article 1, Section 9; Article 111, Section 2; and Amendments IV, V, VI, and VIII.

The sections of the National Prohibition Act are:

Title II, Sections 3, 25, 26, 29, 33, and the Jones Law, approved March 2nd, 1929.

The following cases will be cited to support the above claims:

United States vs. Setaro, 37 Fed. (2nd) 134 U. S. Dist. (Conn.)

Cisson vs. United States, 37 Fed. (2nd) 330 U. S. C. A. (4th).

Skelley vs. United States, 37 Fed. (2nd) 503 U. S. C. A. (10th).

United States vs. Kent, 36 Fed. (2nd) 401 U. S. Dist. (111).

Flynn vs. United States, 36 Fed. (2nd) 891 U. S. C. C. A. (1st).

Sapp vs. United States, 35 Fed. (2nd) 580 U. S. C. C. A. (8th).

United States vs. Lukas, 35 Fed. (2nd) 599 Dist. Ct. (Mass.)

United States vs. Lukas, 35 Fed. (2nd) 599 Dist. Ct. (Mass.)

United States vs. Soloman, 33 Fed. (2nd) 193 Dist. Ct. (Mass.)

The following cases will be referred to tending to oppose the above claims:

Ross vs. United States, 37 Fed. (2nd) 557 U. S. C. C. A. (4th).

Gurera vs. United States, 40 Fed. (2nd) 338 U. S. C C A. (8th).

McClvogne vs. United States, 40 Fed. (2nd) 889 U. S. C. C. A. (8th).

Brady vs. United States, 39 Fed. (2nd) 312.

## ARGUMENT

Inasmuch as the application of the Jones Law, and its effect, appears in the foregoing grounds for reversal and, in some way, was involved in each claim before the

Circuit Court of Appeals, the argument will deal with the law under the above topics in the order above set out.

The constitutionality of this act seems to be acknowledged by the authorities, but there is some dispute as to its application, as effecting the constitutional rights of the offenders to a fair trial.

## SUPRESSION OF THE EVIDENCE

In the case of *U. S. vs. Solomon*, 33 Fed. 2nd, 193, the question of the application of the Jones Law was first applied and it seems that the court holds that this act in making manufacture of intoxicating liquors a felony, all the officers would need to show justification for an arrest would be that he had reasonable grounds to believe that a felony had been committed. This case discusses the difference in relationship between a dwelling and outbuilding, and also discusses the case of *Carroll vs. U. S.*, 267 U. S. 132, 147, and shows the relation between the outbuilding and a driver of an automobile, where it is not practicable to secure a warrant in the case of the vehicle which can be quickly moved.

In the case at bar, there was no such reasonable cause as existed in the Solomon case, and the holding in the Carroll case can not apply, because the evidence discloses that the officer in the case at bar had ample opportunity, with the information he had at hand, if reasonable, (which he apparently did not believe it to be), to secure and serve proper warrants.

Of course, in the case at bar the evidence used as the basis of reasonable and probable cause in no sense measures up to the evidence used as the basis for the arrest in either the Carroll case or the Solomon case.

This is evident from an examination of the facts in these three cases.

In the case of *U. S. vs. Setaro*, 37 Fed. (2nd) 134), the court held that the crime of transportation of liquor, which was formerly a misdemeanor, is not necessarily converted into a felony by the Jones Act, providing that certain offenses, including that of transporting liquors may be punished by imprisonment, etc., since Section 91 provides that it is the intent of Congress that the Court should discriminate between casaul or slight violation and habitual sales or attempts to commercialize violation of the law; but transportation of liquor upon occasions of slight or casual violation is still merely a misdemeanor. The court also holds that to render a lawful arrest for misdemeanor without warrant, the offense must have been committed in the presence of the officer.

If the officer in the case at bar made a valid arrest, how did he know whether it was for a misdemeanor or felony? This uncertainty in itself should eliminate any hypothesis of probable cause or reasonableness. If the arrest turned out to be a misdemeanor, which could only be ascertained after trial, then the evidence should have been suppressed because there was no offense committed directly in the presence of the officer; or within his knowledge except and unless by reason of the presence of the liquor.

In the above cited Setaro case, the accused had been under observation as in the case at bar, (R-P. 35) apparently upon some hearsay evidence that he was a bottlegger. After the officers saw the accused drive into the garage and take two cans (apparently liquor) from the garage to the store, they drove into the place and after displaying their badges and without threats of any kind

and without making an arrest, they asked the accused whether or not he had any liquor in his car, whereupon, the accused replied he had, and thereupon, one of the agents stepped into the garage and looked into the car and observed a five gallon can, which the accused said contained alcohol, together with 1½ cases of whiskey and gin. The court held that there was not probable cause for search or an arrest; *that there was not in fact an arrest;* and that the search and seizure must be incidental to an arrest.

In the case at bar, the officers saw nothing before Husty got into the car, like the carrying of two cans that appeared to contain liquor, or any other circumstance, except the information the officers received, together with the presence of the automobile and Husty, as described in this communication.

It must be remembered in this connection that the trial Judge refused to permit cross-examination of the officer as to the source of the officer's information regarding Husty and his car, (R-P. 34, 38, 39, 40) and, therefore, it was impossible to know whether the person furnishing this information had actual knowledge himself or whether his knowwledge was from hearsay to the n'th degree. The basis, therefore, for probable cause on the part of the officers was much less in the case at bar than in the Setaro case above cited, because in the latter case, the officers could see with their own eyes something tending to substantiate the information received.

There was also no arrest prior to the search in the case at bar. There is nothing in the record indicating that an arrest was made until the liquor was observed in the back end of the automobile.

In addition to the Setaro case, you are referred to the well recognized authorities on what constitutes an arrest in the State of Michigan.

See, People vs. Margelis, 217 Mich. 423.

The most that you can say in this case is that the officers stopped the accused in a polite and decent manner as found in the case of *U. S. vs. Rembert*, 284 Fed. 998-99.

From these authorities, it would indicate that something definite must take place by the arresting officer to indicate that an arrest has been made, and something more than a mere stopping of his automobile, after it had moved for a foot or more, as in the case at bar.

In the case of *U. S. vs. Lukas*. 35 Fed. (2nd) 599, while the court held that there was evidence of probable cause, it appears that the officer received a written communication after which he interviewed the writer, after which he made inquiries regarding the same from others, after which he made several visits in the vicinity of the premises, then on one occasion detected the odor of distillation. On the morning of the search, he saw the defendant come out of the house with a bundle wrapped in burlap and place it in an automobile, which bore registration number identical with that contained in previous information: *but you will find no such a line-up of evidence to support the communication in the case at bar.*

We have been unable to find any case where merely a communication and the discovery of the identity of the person and of the automobile is regarded as sufficient probable cause as a matter of law.

Of all the cases dealing with this subject, no court has had the temerity to go so far as to say that this

meager line-up of facts is sufficient, in itself, as a basis for a reasonable arrest without warrant or a search and seizure.

The court in the Lukas case says,

> "while it is true that in the Carroll case, supra, the convincing information previously acquired had been obtained by the agents at first hand and not through an informer, and while in two recent cases in this Circuit, (Lafazia, et al. vs. U. S., 4 Fed. (2nd) 817; Segurola vs. U. S. 16 Fed. (2nd) 563, the agents had evidence of probable cause apart from confidential communications, I do not regard these cases as conclusive against the Government in the case at bar,"

and then, the court goes on to say that the communication should not be wholly excluded, of course, meaning that such a communication, apart and in itself, is not sufficient as a basis for probable cause.

In any event, without knowing whether the transportation was a felony or misdemeanor, under the Jones Law, how could the officer be reasonably sure he had a right to arrest at all?

See Amendment IV, U. S. Constitution.
People v. Stewart, 323 Mich. 570.

## DEMURRER TO THE INDICTMENT AND MOTION TO QUASH

In the case of *Skelly vs. U. S.*, 37 Fed. (2nd) 503, the court held that under constitutional amendments V and VI, requiring that the indictment inform the accused of the nature and cause of the accusation, the indictment must be sufficiently certain as a pleading to enable the defendant to make his defense, by charging the crime with particularity, and must be sufficiently certain to

enable the accused to plead double jeopardy in case he should be indicted again for the same offense. The Court in this case said:

> "On the proposition that 'where a statute is general, it is not sufficient merely to follow its language in an indictment, but the indictment must allege the specific offense coming under the general description of the Statute, in order that the accused may enjoy the right, secured by the 6th Amendment,' see Boykin vs. U. S., 11 Fed. (2nd) 484-485 and cases there cited."

The National Prohibition Act is exactly the same character of act as found in the Skelley case, and the indictment in the case at bar is nothing more or less than an allegation of the violation of the terms of the act.

This indictment is brief, *in fact too brief*, and the liberty is taken at this time to state it in part:

**TRANSPORTATION COUNT**

**Count I.**

> "that heretofore and on or about, to-wit, the 10th day of December, A. D. 1929, at, to-wit, the City of Grand Rapids, in the County of Kent, in the State of Michigan, in said division of said district, and within the jurisdiction of this Court, Richard Husty and Charles Laurel then and there unlawfully did transport, namely, over and upon the public highways of the County of Kent and Streets of said City of Grand Rapids in said division and district, in an automobile, to-wit, a Graham Paige Coupe certain intoxicating liquor, namely spirituous liquor to-wit, more or less, of whiskey so-called, which said liquor then and there contained one-half of one per centum and more of

alcohol by volume, and then and there was fit for use and for beverage purposes, which said transportation then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act; as amended.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

**POSSESSION COUNT**

**Count II.**

"And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present and say:

That heretofore and on or about, to-wit, the 10th day of December, A. D. 1929, at, to-wit, City of Grand Rapids, County of Kent, and State of Michigan, in said division of said district and within the jurisdiction of this Court, Richard Husty and Charles Laurel then and there unlawfully did possess certain intoxicating liquor, namely, spirituous liquor to-wit, whiskey which said liquor then and there contained one-half of one per centum and more of alcohol by volume, and then and there was fit for use for beverage purposes, which possession then and there was prohibited and unlawful by virtue of the provisions of the National Prohibition Act; as amended.

Contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the United States." (R. 1 & 2).

It is to be observed that neither count specifies the place, the time this liquor was transported and possessed, or the amount thereof. This was a fatal omission in the Skelley case.

In the case of *McElvogue vs. U. S.*, 40 Fed. (2nd) 889, the Court in its opinion specifically referring to an

attack upon the indictment held that the time and place and amount of liquor sold was sufficient in describing the charge.

In the case of *Guerera vs. U. S.*, 40 Fed. (2nd) 338, on a demurrer to the transportation count, the time and the amount covered by the transportation and contained in the indictment, was held to be sufficient.

Although, in these last two named cases, the courts do not hold that these specifications are necessary, nevertheless, it is to be noted that the indictments contain the same as necessary averments to the validity of the indictments and the Courts not being called upon to pass specifically upon this requirement, of course, did not do so.

In the case of *Sapp vs. U. S.*, 35 Fed. (2nd) 580 U. S. C. C. A. (8th), the indictment contained the hour, the street address, the city, and although the question as to whether these averments are necessary was not raised, this is an indication of what is necessary and proper in making this character of charge.

In a recent case before the Supreme Court of the District of Columbia, in the case of the U. S. vs. Dennison, a demurrer, similar to the case at bar, was sustained because the accusation preferred was drawn solely in the words of the Statute, in no way identifying the occasion of the possession, the place, the kind, the character, quantity of intoxicating liquors and gave no sufficient information to the defendant so that former acquital or conviction against another indictment or trial could not be pled. The number of this case is not now available and it is not reported. Dennison was a member of the House of Representatives and the case gained widespread publicity.

It is to be noted that nowhere in this indictment do we find the accused charged with *knowingly* having transported or possessed the liquor. In all of the indictments in the last three named cases, we find the averment of knowledge on the part of the accused. In the Skelley case the averment of knowledge was omitted, while not specifically held to be fatal, *yet the demurrer to the indictment was sustained.*

The indictment made no reference, as you well know, to any claim under and by virtue of the Jones Law. In the case of *U. S. vs. Kent,* 36 Fed. (2nd) 401, the indictment specifically charged a violation of the National Prohibition Act within the provisions of the Jones Law, thus, indicating that a charge under the Jones Law must appear in the indictment in order to properly advise the accused in accordance with Amendment VI of the Constitution. While the question as to the necessity of such an averment in the indictment did not appear in this case directly, and while the constitutionality of the Jones Act was directly attacked by this demurrer, nevertheless, the court would not have been compelled to pass upon the constitutionality of the act, as set forth in this indictment, but could have overruled the demurrer on the ground that this averment was not a material averment.

In the case at bar, an isolated charge of transportation was made against Husty and Laurel. They had no knowledge whether the charge against them was one of felony or for a misdemeanor; whether they were to be considered as charged with a casual or slight violation, or with habitual sales and attempts to commercialize violations of the law.

As this court knows, there is quite some difference

between a misdemeanor and a felony, and the nature and cause of the accusation between the two degrees of crime. In the Setaro case, supra, the court after relating that prior to the Jones Act, transportation was a misdemeanor, and that after this act, transportation could be punished by imprisonment not to exceed five the court said:

> "If the statute stopped at this point, it would be clear that those offenses are now felonies. But the Jones Act does not stop at this point. It continues with the following: "Provided, That it is the intent of Congress that the court, in imposing sentence hereunder, should discriminate between casual or slight violations and habitual sales of intoxicating liquor, or attempts to commercialize violations of the law."
>
> "This proviso and its language require attention and consideration. Was Congress legislating when it added this proviso, or was it merely expressing a pious wish? Did Congress intend to restrict the punishment in cases of "casual or slight violations" to penalties meted out to misdemeanants, or did it merely express a hope that the Courts would fit the penalty to the crime?"

All this means, of course, that Amendments V and VI of the Constitution have been seriously threatened by this Jones Act, unless a proper construction can be placed upon this proviso to save it from being unconstitutional.

## AT THE TRIAL

Following the consideration of the Jones Act with reference to the indictment, it necessarily follows, that if the issues raised by the proviso in this act should be included in the indictment, then the issue should be pre-

sented to the jury and should be included in the charge of the court.

The nature of this contention is set forth in *United States vs. Kent,* 36 Fed. (2nd) 401. You are referred to the language of the court on page 403. And while the court in this case does not approve all the contentions made in the case at bar, the language of our contentions are amply set forth in this opinion on page 403, and furnishes also the only answer that can be made to the contentions, that the failure to submit this issue to the jury is a disregard of Article III, Section 2, of the Constitution.

In the Setaro case, the court, on page 162 of the opinion, concluded that whether or not the offense of the National Prohibition Act is a felony or misdemeanor, could not be determined in advance of trial. In that event, the jury should have the issue, because the court in this case said,

> "As I have construed the language of this Act, it seems to me that upon occasion of 'slight or casual' violation, the offense is punishable as a misdemeanor".

The McElvogue case, supra, and the Gurera case, supra, considers this proviso as being one entitled to determination by the court, and not one properly to be considered by the jury. This indicates to some degree the conflict of authority, which this court must definitely pass upon.

On the subject of there being no evidence of knowledge that the car contained liquor the record speaks for itself. There is clearly no competent evidence that the automobile or the liquor belonged to either Husty or Laurel. There is no evidence of any character that

Husty knew that there was any liquor in the automobile, although Laurel attempted to run from the machine upon seeing the officers, that cannot be a basis for imputing any knowledge on the part of Husty.

The question of failure to permit the cross-examination of the officer with respect to the source of the information he received about the transaction has already been gone into. This applied more to the question of the validity of the arrest.

## THE SENTENCE

In the case of *U. S. vs. Setaro*, 37 Fed. (2nd) 134, the court construed the language of the Jones Act contained in the proviso as meaning that "slight or casual violations" of the offense is punishable as a misdemeanor.

In the case of *Cisson vs. U. S.*, 37 Fed. (3rd) 330, the court said:

> "In view of the fact that the case is remanded as it is, it is not necessary that we pass upon the contention that the sentence imposed was a cruel and unusual punishment forbidden by the Constitution, of course, the matter of punishment, if within the limits described by the Statute, is ordinarily a matter within the discretion of the trial judge.
>
> It would seem, however, that under the National Prohibition Act such punishment as was inflicted here would be justified only where there is proof of repeated sales, or a charge to commercialize violations of the law, or other circumstances of aggravation, such is the intent of Congress as explained in the Jones Act."

In this case the sentence was for a term of five

years, for sale on the second offense, and it appearing that the *sale took place prior to the passage of the Jones Law, the Court held that this law must be construed as applying ONLY to crimes committed after its passage and that Congress is forbidden to pass an ex-post-facto law.*

See the case of *Ross vs. U. S.*, 37 Fed. (2nd) 557 which is a case on the constitutionality of the Jones Act the Eighth Circuit Court of Appeals followed and which in *McElvogue vs. U. S.*, 40. Fed. (2nd) 889 and *Gurara vs. U. S.*, 40 Fed. (2nd) 338. In the Ross case, the defendant maintained a place for the purpose of selling whiskey, a buzzer announced the arrival of anyone at the place where the sale was made, there was a peep-hole, etc., and the place had all the ear marks of being a "speak-easy," and all the circumstances brought the crime for which the defendant was convicted under the claims of attempts to commercialize violations of the law and clearly pointed to habitual sales. In this case Ross was sentenced for two years, but Circuit Judge Waddill rendered a long dissenting opinion, in which he considered that the sale of two drinks of whiskey by a first offender, could not be construed as the habitual sale of intoxicating liquor. This dissenting opinion is respectfully submitted on the proposition of whether or not in the case at bar we have a felony or a misdemeanor, and whether in the case at bar the sentence should be imposed accordingly.

In the Guerera case, supra, the transportation was held to come within the terms of the Jones Act and the defendant was sentenced for a period of only two years. This case is about the most severe that has been re-

ported. It has gone the farthest of any that we have been able to discover in the matter of penalty.

In the McElvogue case, supra, the defendant pled guilty to the first count out of four counts for sales on different dates and was sentenced to one year and one month under the Jones Law. In this case, the court held that because of pleading guilty to one count, rather than take the risk of pleading "not guilty" to the four counts of sales, this was evidence that the defendant was engaged more or less in an established business of this sort.

With this diversity of opinion on this subject, there does not seem to be any definite or fixed rule at this time that can guide Federal Courts or the State Courts in sentencing violators under the Prohibition Act.

This case, therefore, should be reviewed and the meaning of the proviso in the Jones Act should be definitely construed as to its effect and operation.

It is to be observed that the Circuit Court of Appeals in its judgment, (R. p. 68,) finding (4), holds that the sentence in the case at bar was supported by conviction on the second count. If the Circuit Court of Appeals in the case at bar had found the sentence supported by conviction on the first count, for transportation, it is possible to say that there might be, under the constructions of the 8th Circuit, some basis for its finding.

But the Jones Act unfortunately omits the word "possession" from among the crimes listed to which the so-called "5 & 10" penalty applies, *so that under any theory a sentence of five years and a fine of Three Thousand* ($3000.00) *Dollars would not be warranted for possession alone under the Jones Act.*

And further, also, if the Circuit Court, in affirming the sentence, in any way considered the convictions for

possession occurring prior to the passage of the Jones Law, this would tend to violate Article I, Section IX of the Constitution.

This claim is supported by the holding in the Cisson case, supra, where the Court said that the Jones Act had no application to offenses committed before its effective date.

It is our contention that the Jones Act cannot apply to an isolated case of transportation. The Circuit Court of Appeals in holding that the sentence was supported by conviction on the second count, directly infers that conviction in this case on the first count could not sustain a sentence for felony under the facts of an isolated violation for transportation.

We submit that the reasoning in the Setaro case, the Cisson case, and the dissenting opinion in the Ross case should be recognized in this Supreme Court even though this Court may find the Jones Law constitutional.

That while the case of *Brady vs. U. S.*, 39 Fed. (2nd) 312, and similar holdings, may be approved, the Constitution of the United States should still be in some measure respected and this Act should be so construed as to bring it in harmony with the constitutional provisions recited herein.

On the subject of cruel and unusual punishment and excessive fine, while the declaration in the Cisson case may, to some extent, be obiter dicta, nevertheless, the court did not hesitate to declare that the sentence imposed therein was in conflict with Article I, Section IX, of the Constitution.

This Court has decided in *U. S. vs. Farrar*, 281 U. S. 624, that inasmuch as the word "purchaser" is not

specifically referred to in the proper place in the National Prohibition Act that a purchaser does not come within the purview of the Act, and in the same manner, one in possession of liquor cannot come within the purview of the Jones Law.

We, therefore, submit to this Honorable Court that the matters and things referred to herein should be reviewed to the end that the doubt existing as to the proper application of the Jones Law should be settled, and that the injustice of the sentence, the arrest, search and seizure, the indictment and other matters as to these petitioners may be rectified and the judgments of the lower Courts reversed.

Respectfully submitted,

JOHN B. MCMAHON,
PERCY F. PARROTT,
HAROLD A. KESLER,
*Solicitors for Petitioners*